JAY R. WEILL (State Bar No. 75434)
E-Mail: *jweill@sideman.com*
DAVID W. FERMINO (State Bar No. 154131)
E-Mail: *dfermino@sideman.com*
ANDREW R. J. MUIR (State Bar No. 284817)
E-Mail: *amuir@sideman.com*
SIDEMAN & BANCROFT LLP
One Embarcadero Center, Twenty-Second Floor
San Francisco, California 94111-3711
Telephone: (415) 392-1960
Facsimile: (415) 392-0827

Attorneys for Defendant
HIEN MINH NGUYEN

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. HIEN MINH NGUYEN, Defendant.	Case No. CR 15-203 BLF **TRIAL BRIEF**

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The Defendant, Hien Minh Nguyen ("Hien"), is a Catholic priest who was born in Vietnam in 1959 and who, as a young boy, escaped to the United States during the Vietnam War. Hien has been a priest for almost 30 years. He was the pastor of St. Patrick's Church in the San José Diocese from 2008 through 2011, which was the largest parish in the Diocese. In December 2013, he was placed on a leave of absence as a result of the investigation underlying the charges filed in this case.

I. RELEVANT PROCEDURAL HISTORY

The defendant was indicted by Superseding Indictment on December 1, 2015, with 14 bank fraud counts alleging violations of 18 U.S.C. § 1344 (1) and (2) and 4 tax evasion counts alleging violations of 26 U.S.C. § 7201. The defendant pled guilty to the tax evasions counts in an open plea on August 9, 2016.

The Superseding Indictment alleges that Hien defrauded Wells Fargo Bank, N.A., Bank of America, California Savings and Loan, Citibank, and Washington Mutual by endorsing and depositing into his own personal account at Wells Fargo Bank ("WFB"), checks made payable to the Vietnamese Catholic Center ("VCC"), which is a community center for Vietnamese Catholics. Hien was the director of the VCC and the only signatory on its account with Bank of America. There were no false endorsements on any of the fourteen checks. Each check was endorsed by Hein in his own name and deposited into his own bank account at WFB. Hien made no representation to any bank teller at WFB about his relationship to the VCC. Hien has waived his right to a trial by jury and has agreed that the Court shall decide his guilt or innocence to the 14 bank fraud counts based on the First Stipulations of Fact for Trial, which is attached hereto as **Exhibit 1**.[1]

This prosecution is unprecedented. We have been unable to find any cases sustaining an indictment alleging bank fraud statute premised *solely* on the deposit of checks bearing no false endorsement into an account owned by the individual endorsing those checks, where the checks

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[1] The First Stipulations of Fact for Trial was filed on January 27, 2017 as Dkt. #116.

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are made payable to someone other than the endorser.

For the reasons stated herein, this Court should acquit Hein of the bank fraud charges in Counts 1 through 14.

II. ARGUMENT

A. The Bank Fraud Statute

The bank fraud statute, 18 U.S.C. § 1344, provides in pertinent part:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice -
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations or promises; shall be guilty of a crime.

The courts have determined that a scheme to defraud within the meaning of Section 1344(1): is measured by determining whether the scheme demonstrated a departure from fundamental honesty, moral uprightness, or fair play and candid dealings in the general life of the community. The bank fraud statute condemns schemes designed to deceive in order to obtain something of value. *United States v. Goldblatt*, 813 F.2d 619, 624 (3d Cir. 1987). "Scheme" and "artifice" includes any type of deceptive conduct, including fraudulent pretenses or misrepresentations, intended to deceive the financial institution to obtain something of value, such as money. *United States v. Doke*, 171 F.3d 240, 243 (5th Cir. 1999) ("[t]he requisite intent to defraud is established if the defendant acted knowingly and with the specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to himself"); *United States v. Lemons*, 941 F.2d 309, 314-315 (5th Cir. 1991) (same).

The Supreme Court has recognized that there is overlap between subsections (1) and (2) of section 1344. *See, e.g.*, *Shaw v. United States*, 137 S. Ct. 462, 469 (2016) (citing *Loughrin v. United States*, 134 S. Ct. 2384, 2390 n.4 (2014) ("No doubt, the overlap between the two clauses is substantial on our reading, but that is not uncommon in criminal statutes."). Section 1344(2), though, is interpreted by courts as giving clarification to Section 1344(1) narrowing the method by which a scheme to defraud can be executed, that is, "by means of false or fraudulent pretenses,

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representations or promises." *United States v. Monostra,* 125 F.3d 183, 186 (3d Cir. 1997) (recognizing that not every scheme to defraud will be accomplished with the aid of "false or fraudulent pretenses, representations or promises"); *United States v. Schwartz,* 899 F.2d 243, 247 (3d Cir. 1990). But, in addition to proving a scheme to defraud, the government must prove for purposes of Section 1344(2), that the false and fraudulent representations influenced the financial institution's actions.

B. Hien Did Not Engage in a Scheme or Artifice to Defraud a Financial Institution

The Government alleges that Hien's scheme to defraud the banks was affected by soliciting donations from parishioners for the benefit of the VCC, which he received in the form of the fourteen checks at issue, and then depositing those donations into his personal bank account at WFB rather than into the VCC account at Bank of America. Superseding Indictment, ECF No. 56 at ¶¶9–11. There are no facts evidencing such solicitations. Nor are there any facts establishing that Hien's deposits were part of a plan or scheme, nor that he had the specific intent to defraud a financial institution as required by section 1344(1). Hien "intentionally" deposited the checks in his WFB account, but this fact is not tantamount to an admission that he did so as a part of a scheme or plan. Rather, it is an acknowledgment that Hien did not accidently sign the checks or accidentally turn them over to the WFB tellers. But, intentionally endorsing a check and presenting it for deposit does not, without more, establish a scheme or artifice to defraud the banks in the context of section 1344(1).

C. Hien Made No False Statements or Misrepresentation

As the Supreme Court articulated in *Loughlin*, section 1344(2) requires that the defendant '"knowingly execute[ ], or attempt[ ] to execute, a scheme or artifice' with at least two elements. *First*, the clause requires that the defendant intend 'to obtain any of the moneys ... or other property owned by, or under the custody or control of, a financial institution. And *second*, the clause requires that the envisioned result—i.e., the obtaining of bank property—occur 'by means of false or fraudulent pretenses, representations, or promises."' *Loughlin*, 134 S.Ct. at 2389 (emphasis added). Hien's conduct does not constitute a statement or representation in the context

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of section 1344(2), and we urge this Court not to broadly expand the scope of the bank fraud statute to recognize the Government's theory that criminal liability can be premised upon representations that it deems to have been *implied* by Hien.

From 2005 through 2011, Hien had sole signatory authority over the VCC's bank account with Bank of America, which, included authorization to sign and negotiate checks made out to the VCC. Stipulated Facts at ¶3. Hien was not expressly authorized to deposit checks made out to the VCC into his own bank account. *Id.* at ¶6. In the six-year period from 2005 through 2011 when he had sole signatory authority over the VCC's accounts, the Government has identified fourteen checks made out to the VCC that WFB tellers deposited into Hien's personal account at WFB. *Id.* at ¶¶3–7. These checks totaled $19,000 ranging in amounts from $300 to $3,000. Hien signed those checks with his own name and wrote his bank account number on them. *Id.* at ¶¶9–10. Hien did not alter the checks in any way and he did not forge any signature. *Id.* at 10. Hien made no representations to the WFB tellers who accepted the deposits at all, let alone misrepresent his authority to deposit the checks into his personal account. Even though the checks were made out to the VCC, the WFB tellers mistakenly deposited them and credited Hien's account. *Id.* at 11.

There is no question that the WFB tellers made a mistake. The unaltered checks were made out to the VCC and the tellers should not have deposited them into Hien's account. As a result of this conduct, Hien may have been subject to state fraud charges but not federal bank fraud charges as alleged here. Indeed, even the Government has "some mild discomfort with 'federalizing frauds that are only tangentially related to the banking system'". *Loughrin v. United States*, 573 U.S. __, (2014) (citing Brief for United States, 41). To be sure, the primary question with respect to his liability under section 1344(2), then, is whether Hien's signing the checks, as he was authorized to do as director of the VCC, but writing his own account number on them constitutes a false pretense, a material false statement, or a misrepresentation about his authority to deposit checks made out to the VCC into his personal account. Absent evidence of an express statement or representation by Hien to the bank tellers that falsely declared his authority to deposit the checks into his own personal account, the Government relies instead on the theory that Hien *impliedly* misrepresented his authority to deposit the checks when he presented them for deposit

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simply because he endorsed them with his true name and account number. Superseding Indictment, ECF No. 56 at ¶8 ("NGUYEN endorsed and presented his employer's checks to Wells Fargo to be deposited into his personal bank account . . . under the false pretense that he had authority to endorse and present those checks to Wells Fargo to be deposited into his personal bank account. . . .").

D. Hien's Act of Signing a Check with His Own Name is not a "Statement" or "Representation" within the Meaning of Section 1344(2)

Given the dearth of authority directly on point, Hien submits that the legal analysis in this case must begin with the check itself and the writing thereon. There is ample authority stemming primarily from the Supreme Court's opinion in *Williams v. United States*, 458 U.S. 279 (1982), that establishes the proposition that a check, and a signature thereon, is not a statement. In *Williams*, the defendant, a bank president, had deposited several checks that were not supported by sufficient funds. By receiving immediate credit for these checks, he was temporarily able to cover a bad check from one bank by depositing it in a second bank and then writing a bad check from the second bank to the first. The government prosecuted the defendant for knowingly making a false statement or report for the purpose of influencing the action of certain financial institutions. *Id*. at 282. The *Williams* Court held that this conduct did not violate the statute because a check did not amount to a factual assertion that the drawer of the check had sufficient funds on deposit to cover it. *Id*. at 284. The *Williams* Court's holding was based on the principal that "technically speaking, a check is not a factual assertion at all, and therefore cannot be characterized as 'true' or 'false.'" *Id.*

We are unaware of any case where a court has held that an authorized signature on a check transforms into a false representation when the check is presented to the wrong bank for deposit. There are no facts to support the conclusion that signing a check made out to someone else, writing your personal bank account number on it, and presenting it for deposit into your personal account serves to represent or state the depositor's authority to deposit the check. More specifically, there are no facts demonstrating that WFB interpreted the signatures on the fourteen checks at issue to represent Hien's authority to deposit them into his account. *Id.* Nor are there

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any facts supporting the conclusion that banks, depositing customers, courts, or anyone else commonly understand that the signatures at issue represent the depositor's authority to negotiate such checks. *Id. No act of prosecutorial legerdemain can alter this conclusion:* a check is not a factual assertion at all, and therefore cannot be characterized as 'true' or 'false.'"

This is not an insufficient funds case; but the principal from *Williams* that a check conveys no representation is instructive and authoritative nonetheless. This is particularly true where, as here, there is no case holding that a defendant expressly represents his authority to deposit a check that is made out to his employer into his personal account in violation of section 1344(2) by signing it with his true name and writing his personal bank account number on the check. Simply put, despite the fact that *Williams* dealt with a check backed by insufficient funds, the justification for the *Williams* Court's holding—that "a check is not a factual assertion at all, and therefore cannot be characterized as 'true' or 'false'"—is still the most persuasive authority in this case with respect to the communicative value—or lack thereof—of a signature on a check. *Williams*, 485 U.S. at 284–85.

Further, efforts to minimize the *Williams* decision by asserting that it is limited to insufficient funds cases are misplaced because the argument ignores the Supreme Court's *ratio decidendi* that is aptly considered here – that "a check is not a factual assertion at all, and therefore cannot be characterized as 'true' or 'false.'" *Williams*, 485 U.S. at 284–85; *see, e.g.*, *United States v. Medeles*, 916 F.2d 195, 199–200 (5th Cir. 1990) ("The underlying basis of *Williams* is that 'a check is not a factual assertion at all and ... cannot be characterized as 'true' or 'false'' and that a check does not 'make any representation as to the state of ... [the drawer's] bank balance.' If the deposit of a check is not an assertion about the balance in the account, then it seems to us that known insufficiency in the account when the check is deposited cannot of itself constitute the deposit a false or fraudulent pretense or representation.") (quoting *Williams*, 485 U.S. at 284). If there is a category of cases to which *Williams* could be limited, the correct category is those cases—like this one—in which the defendant does nothing more than write true information on the check he presented for deposit. Categorically limiting *Williams* to cases dealing with insufficient funds misapplies *Williams* and the cases interpreting it because the limitation ignores

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the rationale underlying those decisions.

Courts that have declined to "extend" *Williams* beyond the factual circumstance of checks presented for deposit bearing an authorized signature but drawn on insufficient funds have not actually rejected the premise that a check does not convey a statement. Rather, the facts in those cases departed from *Williams* because the defendants had done *something more* to embellish the check or otherwise contribute to the deception other than simply sign their true name to a check—conduct that was not at issue in *Williams*. For example, in *United States v. Falcone*, the Eleventh Circuit found *Williams* inapplicable because the defendant endorsed the check using someone else's signature stamp, which the court found akin to forgery. 934 F.2d 1528 (11th Cir.) (per curiam), reh'g granted and opinion vacated, 939 F.2d 1455 (11th Cir. 1991), opinion reinstated on reh'g, 960 F.2d 988 (11th Cir.) (en banc), cert. denied, 506 U.S. 902 (1992). Similarly, in *United States v. Price*, the Fourth Circuit found that *Williams* did not apply to false and fraudulent credit card receipts that the defendant deposited with the victim bank. 763 F.2d 640, 643 (4th Cir. 1985). The court articulated its rationale as follows:

> In our view, this case is vastly different from the situation in *Williams*. Here, the government never alleged that the credit card sales receipts themselves were statements. Instead, the government proved that false statements, in the form of fictitious credit card numbers and amounts of purchase and names obtained from telephone books, were written onto the receipts. Thus, unlike the checks in *Williams* which carried with them no representation, express or otherwise, as to the drawer's account balance, the credit card sales receipts in this case carried with them express false representations concerning the credit card account numbers, the account owners, and the amounts of purchase. It was these false statements which Price and the others used in order to obtain cash from the bank to which they were clearly not entitled.

Id. Further, the Fourth Circuit recognized the difference between forged and altered checks and "bad checks," i.e. those drawn on insufficient funds. *Id.* at 643 n.3. *See also, United States v. Loughrin*, 134 S.Ct. 2384, 2393 (2014) (forged or altered checks presented for deposit can satisfy the false pretenses element of section 1344(2)); *Elliott v. United States*, 332 F.3d 753, 762 (4th Cir. 2003) (holding that "an affirmative misrepresentation set forth on a check" by means of a forged signature constitute a "false statement"); *United States v. Worthington*, 822 F.2d 315, 316 (2d Cir. 1987) (concluding that printing name of nonexistent drawee bank on check "fits squarely

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within the dictionary definition of 'false statement'"); *United States v. Hord*, 6 F.3d 276, 285 (5th Cir.1993) ("*Williams* does not govern a situation in which some information on the check, such as a false signature, or a fictitious bank, is itself a false statement."); *United States v. Ponec*, 163 F.3d 486, 487–89 (concluding that *Williams* did not apply because the defendant's act of writing his own account number on deposit slips misrepresented his authority to deposit the checks in his own account); *United States v. Miller*, 70 F.3d 1353, 1355 (D.C. Cir. 1995) (entering a third party's PIN without authorization "is tantamount to cashing a check with a forged signature-conduct we have expressly held violates section 1344(2)."). But, none of these cases held that a true, authorized signature on a check can be transformed into a forgery or false statement by virtue of the bank to which it is presented.

In addition, the Ninth Circuit acknowledged in *United States v. King*, that "the deposit of an overdraft check is not a 'false statement," citing the proposition from *Williams* that a check is not a factual assertion. 200 F.3d 1207, 1218 (9th Cir. 1999). However, pointing to defendant's affirmative and false assurances to the victim bank, the court found that "deceptive conduct connected to the use of worthless checks brings a defendant within the reach of § 1344(2)." *Id.* (citing *United States v. Burnett*, 10 F.3d 74, 79 (2d Cir. 1993) (holding that defendant violated § 1344(2) where he embellished a check kiting scheme with false assurances to the bank that his overdrafts were mistakes and would be corrected); *United States v. Sayan*, 968 F.2d 55, 61 n.7 (D.C.Cir. 1992) (noting that *false* signatures and endorsements on checks and drafts would have supported conviction under § 1344(2) had that statute been in effect at the time of the offense). In *King*, the defendant made false assurances to bank personnel that the overdraft check had been a mistake and he would cover it and that he would certify new checks if the bank returned his overdraft checks uncollected, which was impossible because the underlying account had been closed. *King*, 200 F.3d at 1218. What is clear from these authorities is that a check alone does not convey either an implied or express representation; but, other fraudulent conduct, such as altering or forging a check, making false assurances to the bank, or conspiring to conceal the fraud could establish the element of misrepresentations or false pretenses.

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We agree that cases like those cited above—where the defendants engaged in some conduct other than signing a check as the defendant was authorized to do—are properly distinguishable from *Williams* as a result of the additional fraudulent conduct that was not at issue in *Williams*. But, they cannot govern the case at hand to disqualify *Williams* because Hien did not forge a signature on any of the fourteen checks, and he did not alter them in any way. Nor are there any facts supporting the argument that the checks contained any affirmatively false information, or that Hien engaged in any other conduct to embellish the checks.

The Superseding Indictment alleges that Hien violated section 1344(2) because he "endorsed and presented his employer's checks to Wells Fargo to be deposited into his personal bank account . . . under the false pretense that he had authority to endorse and present those checks to Wells Fargo to be deposited into his personal bank account. . . ." Superseding Indictment, ECF No. 56 at ¶8. In essence, the Government's case with respect to section 1344(2) relies on its claim that endorsing a check and presenting it for deposit *impliedly* represents the signatory's authority to deposit the check. But, the *Williams* Court rejected a similar implied representation theory that was based upon the purported "common understanding" that a signature on a check implied sufficient funds. *Williams*, 458 U.S. at 286 ("And when interpreting a criminal statute that does not explicitly reach the conduct in question, we are reluctant to base an expansive reading on inferences drawn from subjective and variable 'understandings."'). In fact, the Supreme Court reasoned that a theory of implied representation premised upon "common understanding" was a "particularly fragile foundation upon which to base an interpretation of § 1014." *Id.* at n.7.

The courts have recognized that an implied misrepresentation theory is a weak, if not untenable, bases for criminal liability under section 1344(2). For example, the Tenth Circuit noted that, "[t]he common thread running through *Williams* and its progeny is that a criminally prohibited statement or representation cannot be formed from an implied representation that the maker of a check will have sufficient funds to pay the check upon presentment." *United States v. Bonnett*, 877 F.2d 1450, 1456 (10th Cir. 1989). In *Bonnett*, the prosecution alleged that defendants conspired together and made deceptive use of checks drawn on accounts with insufficient funds to achieve an artificially high account balance and to allow interest-free use of

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the victim bank's funds on deposit. *Bonnett*, 877 F.2d at 1452–53.

The Tenth Circuit's analysis with respect to the false representation element began with *Williams*, just as we urge in this case. The Tenth Circuit adopted the principal—derived from *Williams* and its progeny—that "*Williams* holds that a check is not a statement; that it is merely an order to the drawee bank to pay the face amount to the payee and a promise to pay upon notice of dishonor." *Id.* at 1456. Accordingly, the court dismissed the theory that a check impliedly represents that there are sufficient funds in the bank fraud context. *Id.* But, the court did uphold Mr. Bonnet's conviction by distinguishing *Williams* on the ground that "[t]he misrepresentation in this case was not an implied representation that the checks were good, as in *Williams*; "rather it was the conduct of the conspirators in acting as if the checks were good and treating the checks in all respects as if they were drawn on collectable funds, with the knowledge the Dierksen checks were worthless." *Id.* at 1457. In essence, the checks could not form the basis of a misrepresentation, implied or otherwise; but, on the other hand, defendants' cooperative conduct to "keep the kite in the air," so to speak, created the false pretenses that allowed Bonnett to obtain bank property. The decision in *Bonnett* is consistent with our argument, that *Williams* ought to be applied to find no express or implied representation with respect to authority to deposit a check where the information on the check is true and there are no other false representations or fraudulent conduct.

III. CONCLUSION

Hien signed his own name on each check, as he was authorized to do, having, sole signature authority for the VCC. He did not forge his name or that of the VCC on any of the checks listed in the Superseding Indictment. There was no false endorsement since he was the sole person authorized to endorse checks made payable to the VCC. What he, in fact, did do fourteen times over the course of three year years, was to walk into a WFB branch, rather than a branch of Bank of America, and hand the checks over to a teller who deposited them into Hien's personal WFB account. The simple act of handing to a WFB teller a properly endorsed check with no false endorsement is not bank fraud as described in 18 U.S.C. § 1344(1) or (2).

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Hien should be acquitted of all 14 bank fraud counts as charged in count 1 through 14.

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DATED: January 30, 2017

By: /s/JAY R. WEILL
JAY R. WEILL
Attorneys for HIEN MINH NGUYEN

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